

立法會
Legislative Council

LC Paper No. LS38/19-20

**Legal Service Division Report on
Statute Law (Miscellaneous Provisions) Bill 2019**

I. SUMMARY

- 1. The Bill** The Bill seeks to introduce miscellaneous amendments to various Ordinances, including the High Court Ordinance (Cap. 4) and the Interpretation and General Clauses Ordinance (Cap. 1). The major proposed amendments relates to matters including:

 - (a) extension of the jurisdiction of the Court of Appeal which consists of two Justices of Appeal ("JAs") under Cap. 4;
 - (b) extension of references made to Ordinances, which are recognized under Cap. 1, to those references made according to the title, citation or chapter number used in the verified copies that are directly printed from the approved website of an electronic database of the legislation of Hong Kong;
 - (c) standardization of the Chinese text of the defence containing the phrase "could not with reasonable diligence have (done something)" in various Ordinances to reflect the meaning of the defence more explicitly; and
 - (d) other miscellaneous amendments to various Ordinances which are of technical nature.

- 2. Public Consultation** According to the Legislative Council Brief, the Judiciary Administration conducted a consultation on the proposed amendments to Cap. 4 with stakeholders, including the two professional bodies, from 17 June 2019 to 6 September 2019. The Law Society of Hong Kong indicated support for the proposed amendments. The Hong Kong Bar Association ("HKBA") had no objection to the proposed amendments after the Judiciary Administration had clarified certain queries raised by HKBA.

- 3. Consultation with LegCo Panel** The Panel on Administration of Justice and Legal Services ("Panel") was briefed on the proposed amendments to Cap. 4 on 24 June 2019. While members raised no objection to the proposed amendments, a number of views and concerns had been raised. Except the amendments to Cap. 4, the Panel has not been consulted on other legislative amendments.

- 4. Conclusion** The Legal Service Division is scrutinizing the legal and drafting aspects of the Bill. In view of the Panel's concerns, Members may consider studying the Bill in detail.

II. REPORT

The date of First Reading of the Bill is 15 January 2020. Members may refer to the Legislative Council ("LegCo") Brief (File Ref.: LP 3/00/15C) issued by Department of Justice in December 2019 for background of the Bill.

Object of the Bill

2. The Bill seeks to provide for miscellaneous amendments to various Ordinances, including the High Court Ordinance (Cap. 4) and the Interpretation and General Clauses Ordinance (Cap. 1).

Provisions of the Bill

3. This is an omnibus bill which consists of five Parts. The major proposed amendments in the Bill are summarized in the following paragraphs.

Amendments to the High Court Ordinance (Cap. 4)

4. Section 34B of Cap. 4 relates to the Court of Appeal ("CA") in the exercise of its civil jurisdiction. Under section 34B(2) of Cap. 4, CA is duly constituted for the purpose of exercising any of its civil jurisdiction if it consists of an uneven number of Justices of Appeal ("JA") not less than three. At present, CA that consists of two JAs ("two-JA bench") is also duly constituted for the purposes specified in section 34B(4), including hearing (or determining) an application for leave to appeal other than that for leave to appeal to the Court of Final Appeal ("CFA"), an appeal against a decision of a single JA or a decision on an interlocutory application in relation to a matter pending before CA, and an appeal where all parties to the appeal have filed a consent to the appeal being heard by two JAs.

5. Part 2 of Bill seeks to amend section 34B of Cap. 4 to:

- (a) extend the jurisdiction of a two-JA bench to hear and determine (i) applications for leave to CFA against the decisions made by CA consisting of less than three JAs and (ii) appeal against the Court of First Instance's decisions to refuse to grant leave to apply for judicial review or to grant such leave on terms of the application pursuant to Order 53, rule 3(4) of the Rules of the High Court (Cap. 4A);
- (b) allow parties to an appeal (or application) before a two-JA bench to apply, and also provide that any two-JA bench may make an order of its own motion, for the appeal (or application) to be re-argued before three-JA bench when the two-JA bench cannot reach an unanimous decision; and

- (c) provide for transitional arrangements relating to the relevant appeal (or application) that are duly filed before the commencement date of Part 2 of the enacted Ordinance after the Bill is passed by LegCo.

6. Part 2 of the Bill also seeks to amend sections 2, 4 and 5 of Cap. 4 so that a JA may act as an additional judge of the Court of First Instance ("CFI") and a CFI judge may act as an additional JA of CA without sitting in the relevant court. The effect would be that additional judges in CFI and CA would have the express power to dispose of cases before them on paper without physically sitting in court.¹

7. According to paragraph 5 of LegCo Brief, the Judiciary anticipates that the proposed amendments to section 34B of Cap. 4 would facilitate the processing of cases, including judicial review involving non-refoulement cases and increase the flexibility in deployment of judicial manpower in taking up other court cases. The Judiciary also expects that the clarification of the powers of the additional CFI or CA judges by the proposed amendments to Cap. 4 to dispose of cases on paper could promote just, expeditious and economical disposal of court proceedings on paper where appropriate, thus increasing the courts' overall efficiency of case handling.

Amendment to the Interpretation and General Clauses Ordinance (Cap. 1)

8. Section 13(2) of Cap. 1 provides that any reference made to any Ordinance may be made according to the title, short title, citation, number or chapter number used in copies of Ordinances printed by the Government Printer (i.e. the loose-leaf edition of the Laws of Hong Kong). Section 5 of the Legislation Publication Ordinance (Cap. 614) provides for the legal status of verified copies of legislation that are printed directly from the approved website of an electronic database of the legislation of Hong Kong established by the Secretary for Justice under section 3 of Cap. 614.

9. In the light of section 5 of Cap. 614, Part 3 of the Bill seeks to amend section 13(2) of Cap. 1 to provide that references made to an Ordinance may be made according to the title, short title, citation, number or chapter number used in verified copies of the Ordinance published under Cap. 614, in addition to those printed by the Government Printer.

Amendment to the Chinese text of certain defence provisions containing the "could not with reasonable diligence" reference in various Ordinances

10. In *HKSAR v Kong Hing Agency Ltd*², CA interpreted the statutory defence containing the phrase "could not with reasonable diligence have (done something)" ("the

¹ Section 4(2) and 5(2) of Cap. 4 provide respectively that a JA may sit in CFI and act as a judge of CFI, while a CFI judge may sit as an additional judge in CA. However, there could be ambiguities as to whether such additional judges in CA and CFI could exercise their judicial power without physically sitting in the relevant court and whether the additional judges could exercise their judicial power to dispose of cases before them on paper.

² Reported in [2008] 2 HKLRD 461.

defence") to refer to an objective test of what a person "could have been reasonably expected to have done in the circumstances". As such, the defence should refer to a hypothetical situation. According to such interpretation on the defence, there is no need for the court to examine what the accused had actually done in the given situation. In that regard, CFI has mentioned in its judgment in *香港特別行政區 訴 楊啟強*³ that there are variations in the Chinese text of the defence in different Ordinances, and certain versions of the Chinese text could give an impression that the defence refers to a test or situation other than an objective test or a hypothetical situation as interpreted in *HKSAR v Kong Hing Agency Ltd.*

11. To address the concern raised by CFI in *香港特別行政區 訴 楊啟強*, Part 4 of the Bills seeks to standardize the Chinese text of the defence in various Ordinances to make it read "即使作出合理努力也不能...".

Other miscellaneous amendments

12. Part 5 seeks to make miscellaneous amendments of technical nature to various Ordinances. These amendments include updating the references to the titles of certain ordinances, amending cross-references and updating certain terms and expressions in ordinances to achieve consistency, and to make provisions for correcting minor errors, for example, replacing the term "widows" by a gender neutral term "surviving spouses" and replacing the term "defective" by "mentally incapacitated person" in certain Ordinances.

Commencement

13. The Bill, if passed, would come into operation on the expiry of 30 days beginning on the day on which it is published in the Gazette as an Ordinance, except that

- (a) Part 2 (i.e. amendments to Cap. 4) would come into operation on a day to be appointed by the Chief Justice by notice published in Gazette; and
- (b) Division 11 of Part 4 (i.e. an amendment to the Chinese text of a defence to an offence by owner and tenant of an unlicensed hotel or guesthouse in section 5A of the Hotel and Guesthouse Accommodation Ordinance (Cap. 349)) would come into operation on the later of the following dates—
 - (i) the date on which the Bill is published in the Gazette as an Ordinance; or
 - (ii) the date on which Part 2 of the Hotel and Guesthouse Accommodation (Amendment) Bill 2018 comes into operation after it is passed by LegCo⁴.

³ Reported in [2018] 2 HKLRD 1320, see paras. 43-53.

⁴ This Bill has been scrutinized by a Bills Committee which will report to the House Committee in due course.

Public Consultation

14. According to paragraph 14 of the LegCo Brief, regarding the proposed amendments to the Cap. 4, the Judiciary Administration conducted a consultation with stakeholders, including the two professional bodies, from 17 June 2019 to 6 September 2019. While The Law Society of Hong Kong indicated support for the proposed amendments, the Hong Kong Bar Association ("HKBA") had queried whether there were alternative measures that could alleviate the workload of the Judiciary other than making legislative amendments and whether the high standards of fairness would be affected by the proposed amendments. To address HKBA's query, the Judiciary Administration has elaborated further on the justifications and the necessity of the proposed amendments to streamline court procedures and promote efficiency in handling appeal cases. It also reiterated that the established mechanism to ensure high standards of fairness in a proceeding would in no way be affected by the proposed amendments. Thereafter, HKBA indicated that it had no further comment on the proposed amendments to Cap. 4.

Consultation with LegCo Panel

15. The Panel on Administration of Justice and Legal Services ("Panel") was briefed at its meeting on 24 June 2019 on the Judiciary's proposed amendments to Cap. 4 to facilitate the efficient handling of cases, including those relating to non-refoulement claims. While members the Panel raised no objection to the proposed amendments, they were concerned about the effectiveness of the proposed amendments and their impacts on the standard of fairness. Some members were also concerned about the sharp increase in the number of cases in relation to non-refoulement claims, and other measures to facilitate the efficient handling of cases by the courts. Except the proposed amendments to Cap. 4, the Panel has not been consulted on other legislative amendments contained in the Bill.

Conclusion

16. The Legal Service Division is scrutinizing the legal and drafting aspects of the Bill. In view of the Panel's concerns, Members may consider studying the Bill in detail.

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